

IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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IN RE:)	
)	
UNITED CITIES GAS COMPANY,)	
a Division of ATMOS ENERGY)	
CORPORATION INCENTIVE PLAN)	
ACCOUNT (IPA) AUDIT)	CONSOLIDATED DOCKET NOS.
)	01-00704 and 02-00850
UNITED CITIES GAS COMPANY,)	
a Division of ATMOS ENERGY)	
CORPORATION, PETITION)	
TO AMEND THE PERFORMANCE)	
BASED RATEMAKING)	
MECHANISM RIDER)	

CONSUMER ADVOCATE'S MOTION TO COMPEL DISCOVERY

Comes now Paul G. Summers, Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), pursuant to Rules 37.01(2) and 36.01 of the Tennessee Rules of Civil Procedure, Tennessee Regulatory Authority Rule 1220-1-2-.11(9), and the Hearing Officer's Order of August 26, 2004, and hereby respectfully moves to compel Atmos Energy Corporation ("AEC") to fully and completely answer and respond to the discovery requests that are the subject of this Motion.

I. INTRODUCTION

In accordance with the procedural schedule established by the Hearing Officer, the Consumer Advocate filed its first round of discovery requests and served them on AEC on August 13, 2004. AEC filed responses and served them to the Consumer Advocate on September 1, 2004.

In its responses, AEC raised objections to the Consumer Advocate's discovery requests.¹ In addition, the Consumer Advocate finds AEC's responses to certain other requests to be inadequate or incomplete. The Consumer Advocate has not previously sought to work through these discovery disputes informally. The Consumer Advocate will contact AEC to in an attempt satisfactorily resolve the discovery disputes that are the subject of this Motion.

II. STANDARD FOR DISCOVERY

Tennessee has a broad policy which favors the discovery of any relevant information.

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Tenn. R. Civ. P. 26.02(1). Thus, evidence does not have to be admissible to be discoverable as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Today, it is through discovery rather than pleadings that the parties attempt "to find the truth and to prepare for the disposition of the case in favor of the party who is justly deserving of a judgment." *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615 at *3 (Tenn. Ct. App. 2002) (quoting Irving Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 125 (1962)). Accordingly, a party seeking discovery is entitled to obtain any information that is relevant to the case and not privileged. *See Id.* Consistent with Tennessee's open discovery policy, the relevancy requirement is "construed broadly to encompass any matter that bears on, or

¹ The objections of AEC were filed at 3:38 PM on September 1, 2004, outside the time period described in the Hearing Officer's Order of August 26, 2004.

that reasonably could lead to other matters that could bear on any of the case's issues." *Id* Discovery therefore is not limited to the issues raised by the pleadings. *See Id., see also Shipley v Tennessee Farmers Mutual Ins. Co.*, 1991 WL 77540 at *7-8 (Tenn. Ct. App. 1991). A party may also use discovery to: define and clarify the issues, probe a variety of fact-oriented issues that are not related to the merits of the case; formulate and interject additional issues into the case which relate to the subject matter of the pleadings; and determine additional causes of actions or claims which need to be or can be asserted against a party or against third parties. *See Shipley*, 1991 WL 77540 at *7-8 (*quoting Vythoulkas v. Vanderbilt University Hospital*, 693 S.W.2d 350, 359 (Tenn. Ct. App. 1985)).

It is nonetheless recognized that the trial court may limit discovery under appropriate circumstances. Because of the broad policy favoring discovery, however, the trial court should not order limitations on discovery unless the party opposing discovery can demonstrate with more than conclusory statements and generalizations that the discovery limitations are necessary to protect the party from annoyance, embarrassment, oppression, or undue burden and expense. *See Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1991). The trial court should decline to limit discovery if the party opposing discovery cannot produce specific facts to support the requested limitations. *See Id.* Moreover, given the liberal construction of discovery rules, the trial court should approach any request for limitations with common sense rather than with narrow legalisms, basing the reasonableness of any ordered limitations on the character of the information sought, the issues involved, and the procedural posture of the case. *See Id.* Rather than denying discovery outright, it is appropriate for the trial court to fashion remedies to discovery issues by balancing the competing interests and hardships of the parties and by considering whether there are less burdensome means for acquiring the requested information. *See Id.*

III. THE TRA SHOULD COMPEL AEC TO RESPOND TO THE CONSUMER ADVOCATE'S DISCOVERY REQUESTS

In these dockets AEC submits to the TRA proposals that amend the Performance Based Ratemaking (PBR) mechanism previously approved by the TRA in TRA Docket No. 97-001764. It falls upon the TRA to determine if the amendments proposed should be approved. In an effort to obtain information that is necessary for the TRA to fulfill its responsibilities, the Consumer Advocate fashioned its discovery requests to obtain information regarding AEC's proposals. The Consumer Advocate's discovery requests were calculated to define and clarify the issues, probe the factual basis of the proposals, and formulate issues which the Consumer Advocate believes should be considered in review of the proposed amendments. Accordingly, the Consumer Advocate's requests are calculated to lead to the discovery of admissible evidence in the TRA's review of AEC's proposals in TRA Docket Nos. 01-00704 and 02-00850.

For these reasons and the reasons set forth below, the Consumer Advocate respectfully requests the TRA to enter an order compelling AEC to respond to the following Consumer Advocate discovery requests: Interrogatories 11, 12 and 15; Requests To Produce 2 and 5; and Requests To Admit 9, 18, 19 and 34.

In response to **Interrogatory No. 11**, AEC does not provide an answer to two (2) questions: 1) How would the gas provider recover losses from the transportation provider?, and 2) Does AEC intend to pursue the path outlined by Mr. Creamer? The first question AEC ignores in its response. In response to the second question, AEC suggests that it is not able to answer the question due to lack of information. The response is problematic in the sense that AEC has suggested that the present PBR must be changed because of an alleged defect in the current PBR plan incents AEC to make purchases that do not result in the best costs to consumers. To the extent AEC intends to pursue this argument as support for its request that the

PBR be changed, or that the PBR should be interpreted differently, AEC is obliged to make a decision on whether or not it intends to pursue a course described by Mr. Creamer. Otherwise, the hypothetical suggesting a defect in the PBR approved by the TRA has no real world application and therefore, no concrete application to this contested matter.

The request and response at issue are set out below:

11. Lines 164-166 of Mr. Creamer's testimony, filed July 30, 2004, describe how "Atmos could increase its savings on the commodity portion, which it would share in, by entering into relatively high transportation cost arrangements (which would be passed on to the ratepayer) in order to lower commodity costs." Explain in detail how AEC could do this? Who would provide the transportation? Who would provide the gas? How would the gas provider recover losses from the transportation provider? If AEC could make money doing this, has this already been done? Does AEC intend to pursue the path outlined by Mr. Creamer?

RESPONSE: Atmos could purchase transportation services from a pipeline company and the commodity from that pipeline company's affiliate. The pipeline company may charge "full price" for a service that it might otherwise discount, and have the affiliate offer a discount off the commodity to secure the deal. This "pass-through" of the implied transportation discount to the affiliate's commodity charge to Atmos would be captured as a benefit in the PBR plan, if transportation costs were excluded. Atmos has not to date entered into such transactions. In the future, Atmos intends to follow the guidelines set forth in its PBR tariff, however those guidelines are interpreted or amended by this consolidated docket. Because the appropriate treatment of transportation costs will not be determined until the resolution of this consolidated docket, Atmos is without sufficient information to provide further speculation as to possible future actions.

In response to **Interrogatory No. 12**, AEC initially appears to respond adequately. However, on review it is clear that AEC has responded to a completely different request than the one posed. If AEC is going to rely on other factors to qualify its answer to the request, such as “operational, reliability, and safety concerns,” it should at least define these terms and demonstrate how each actually impacts “Mr. McCormac’s hypothetical.” It is inappropriate for AEC to be permitted to expand on this response, or any of its discovery responses, later in testimony before the TRA, if AEC is permitted at this stage to rely on conclusory statements which offer no assistance toward a fact based decision on the merits. Further, AEC should be compelled to identify the purchases it has made for which it distinguishes “Mr. McCormac’s hypothetical” using the “purchasing decisions” it references regarding “operational, reliability, and safety concerns.”

The request and response at issue are set out below:

12. Has AEC or affiliates made gas purchases similar to those illustrated in “Option 1” of Attachment A to Mr. McCormac’s testimony, filed July 30, 2004, in which the total delivered cost at the “Maximum FERC Rate” would be greater than the cost of gas that could have been purchased at the city gate? Provide details of all such purchases and explain the reasoning behind these purchases.

RESPONSE: Atmos is unaware of any purchases fitting the specifications outlined in Mr. McCormac’s hypothetical. As noted in paragraph 5 of the Affidavit of Ron McDowell, previously filed in this matter, Mr. McCormac’s hypothetical is overly simplistic and does not reflect the realities of the Company’s gas supply purchases. The hypothetical ignores additional considerations the Company must take into account in making purchasing decisions, including operational, reliability, and safety concerns. Purchases without a separate transportation component like the “Murfreesboro” example cited in Mr. McCormac’s affidavit are not generally

backed by primary firm transportation and may not be available on critical days. In order to meet its service obligations, the Company follows a general practice of subscribing to primary firm transportation. Differences in reliability requirements directly impact pricing for transportation services. Mr. McCormac did not specify the service obligations of the two delivery hypotheticals; however, in order for the Murfreesboro example to be the low price option, the service obligation must be interruptible. Consequently, Mr. McCormac is making an apples to oranges comparison that does not take into consideration the reality of the working gas market.

In

response to **Interrogatory No. 15** AEC indicates that its responses to each Request To Admit offers a reply to this interrogatory. The Consumer Advocate requests that AEC be compelled to supplement its answer to this interrogatory, but will discuss the reasons for the request to compel in conjunction with the Requests To Admit. The Consumer Advocate chooses this approach as a matter of organization, but also in light of the fact that the best result may include, deeming the Requests To Admit admitted, AEC amending its responses to some of the Requests To Admit or AEC supplementing with respect to Interrogatory No. 15, pursuant to Tenn. R. Civ. P. 36 and 37.

The request and response at issue are set out below:

15 If your response to any Request for Admission is other than an unqualified admission, state for each such Request for Admission the following

- a. all facts that you contend support in any manner your response to the extent it is not a complete admission;
- b. for any information you contend is incorrect or inaccurate provide the correct information,
- c. identify all documents, or any tangible or intangible thing that supports in any manner your lack of admission or your qualification of your admission;
- d. the name and address of the custodian of all tangible things identified in response to subsection (b) of this interrogatory; and
- e. the name and address of all persons, including consultants, purporting to have any knowledge or factual data upon which you base your lack of admission or your qualification of your admission.

RESPONSE: Atmos' response to this interrogatory is included in the admission responses below. For Atmos' response to subsection (c) above, see the Company's response to Interrogatory No. 2.

AEC objects to **Request To Produce No. 2** and does not provide the subject items. At the outset, it must be noted that AEC sought similar information in its discovery request. Further, the the objection lodged by AEC is inconsistent with the goal of open discovery discussed previously herein.

Moreover, the objection itself does not fit the request. The request is not vague, nor overly broad, nor unduly burdensome. The request does have great potential for leading to admissible evidence. In responding to the discovery request AEC reviewed certain documents and things to prepare its answers. The request clearly seeks these documents and things and is therefore not vague. The spectrum of the request is defined by the documents reviewed and is therefore not overly broad. All AEC had to do in responding to this request was to accept the burden, which was identified for them at the time they received the request and therefore before

their preparation of the responses began², of taking note of what documents and things it referred to in preparing its responses. The task was not unduly burdensome. The fact that these documents and things were necessary to review in responding to the Consumer Advocate's discovery request is an undeniable testament to the value of the information.

The request and response at issue are set out below:

2. Any and all documents reviewed to prepare your answers or responses to these Interrogatories

RESPONSE: The Company objects to this request on the grounds that the request is vague, overbroad, unduly burdensome and seeks information which is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

AEC objects to **Request To Produce No. 5** and does not provide the subject items. Further, the objection lodged by AEC is inconsistent with the goal of open discovery discussed previously herein. AEC has attempted to place at issue in this matter a January, 2001 meeting between it and the TRA Staff. AEC claims that it took with it to that meeting an understanding of how the PBR approved in TRA Docket No. 97-01364 should work. The actual understanding of AEC is an area in which the Consumer Advocate has a right to inquire. The use of the FERC's maximum transportation price is at the center of AEC's attempt to amend the PBR approved in TRA Docket No. 97-01364. The request has great potential for leading to admissible evidence.

² This is not a situation where AEC had to reach back in time to develop the information. The information was developed contemporaneously with preparation of the response. All AEC had to do was keep up with the documents and things it reviewed

Moreover, the objection itself does not fit the request. The request is not vague, nor overly broad, nor unduly burdensome. In responding to the discovery request AEC knows to search for references to FERC's maximum transportation price within a known universe. The request clearly seeks these documents and things and is therefore not vague. The spectrum of the request is clearly defined and is therefore not overly broad. It may be that no such documents and things exist. However, the existence of the documents and things is best answered by AEC which likely has exclusive control these documents. Further, the documents would have been reviewed prior to the January, 2001 meeting and are likely readily available to AEC. There is no undue burden contained in this request.

The request and response at issue are set out below:

5. Provide copies of emails, notes, reports, or studies which are authored before January 31, 2001 by any AEC employee(s), expert(s), or consultant(s) and which refer to FERC's maximum transportation price

RESPONSE: Atmos objects to this request on the grounds the request is vague, overbroad, unduly burdensome and seeks information which is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving that objection, Atmos has made a reasonable search of its records and the only documents it discovered responsive to this request are the Company's ACA and PGA filings and quarterly and annual PBR reports, copies of which have previously been provided to the CAPD.

In response to **Request To Admit No. 9** AEC references its response to Interrogatory No. 5. However, the response to Interrogatory No. 5 does not appear to bear enough information on point to explain AEC's refusal to answer.

It is likely AEC meant to reference Request To Produce No. 5. However, this response

leaves much at issue. AEC has cited generally to some filings it has made. An adequate response to **Interrogatory No. 15** requires that AEC actually identify the specific references in the specific documents and things it references. Otherwise, it has failed to adequately respond to the challenge that significant references to the FERC's maximum transportation price are absent from this record.

The request and response at issue are set out below:

9 Before the January 31, 2001 meeting with the TRA Staff, AEC had not prepared memoranda, emails, notes, reports, studies or other documents which refer to FERC's maximum transportation price

RESPONSE: Denied. See Atmos' response to Interrogatory No. 5 above.

In response to **Requests To Admit Nos. 18 and 19** AEC claims it lacks the knowledge to respond to the request. The response is incongruent with the requirements of Rule 36.01 of the Tennessee Rules of Civil Procedure, which in pertinent part states:

An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.

AEC has not made such a declaration. In fact, it can not do so. The choice to pursue the path described in the Request is under the control of AEC.

The response is problematic in the sense that AEC has suggested that the present PBR must be changed because of an alleged defect in the plan incents AEC to make purchases that do not result in the best costs to consumers. To the extent AEC intends to pursue this argument as support for its request that the PBR be changed, or that the PBR should be interpreted differently, AEC is obliged to make a decision on whether or not it intends to pursue a course described by this request. Otherwise, the hypothetical suggesting a defect in the PBR approved by the TRA

has no real world application and therefore no concrete application to this contested matter.

The requests and responses at issue are set out below:

18. AEC intends to invite pipeline companies to end their discount-pricing transportation services being provided to AEC if the TIF tariff is denied by the TRA

RESPONSE: In the future, Atmos intends to follow the guidelines set forth in its PBR tariff, however those guidelines are interpreted or amended by this consolidated docket. Because the appropriate treatment of transportation costs will not be determined until the resolution of this consolidated docket, Atmos is without sufficient information to admit or deny this request.

19. AEC intends to voluntarily increase its payments for discount-price transportation services being provided to AEC if the TIF tariff is denied by the TRA.

RESPONSE: In the future, Atmos intends to follow the guidelines set forth in its PBR tariff, however those guidelines are interpreted or amended by this consolidated docket. Because the appropriate treatment of transportation costs will not be determined until the resolution of this consolidated docket, Atmos is without sufficient information to admit or deny this request.

In response to Request To Admit No. 34 AEC denies “other allegations” without identifying those allegations. An adequate response to **Interrogatory No. 15** requires that AEC actually identify these allegations and describe the support for its denial. It has not done so.

The request and response at issue are set out below:

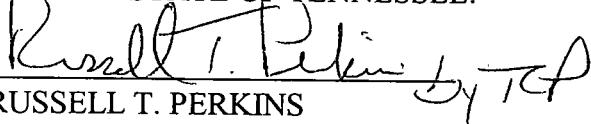
34. The FERC currently develops a maximum annual transportation rate for each pipeline that, when applied to the pipeline's contract demand and throughput levels, will enable the pipeline to recover its annual cost-of-service requirement.

RESPONSE: Atmos admits that the FERC currently develops a maximum transportation rate for each pipeline, and the intent is that, when applied to the pipeline's contract demand and throughput levels, the rate will provide the pipeline with an opportunity to recover its annual agreed-upon cost-of-service revenue requirement. All other allegations in this request are denied.

IV. CONCLUSION

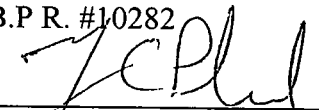
The foregoing considered, the Consumer Advocate respectfully moves for an order compelling AEC to supplement its discovery responses.

FOR THE STATE OF TENNESSEE:


RUSSELL T. PERKINS

Deputy Attorney General

B.P.R. #10282


TIMOTHY C. PHILLIPS

Assistant Attorney General

B.P.R. #12751

Consumer Advocate & Protection Division
425 Fifth Avenue, North, 3RD Floor
Nashville, TN 37243-0491
(615) 741-3533

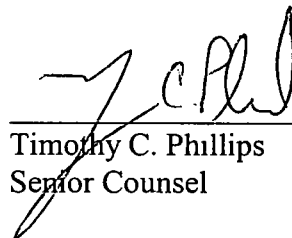
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail, facsimile or hand delivery on September 8, 2004

Jean Stone, Esq.
Hearing Officer
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505
(615) 741-2904

Randal Gilliam, Esq.
Office of Legal Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505
(615) 741-2904

Joe A. Conner, Esq.
Baker, Donelson, Bearman & Caldwell
1800 Republic Centre
633 Chestnut Street
Chattanooga, Tennessee 37450-1800
(423) 752-9527



Timothy C. Phillips
Senior Counsel

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